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IN THE

MICHAEL BOGDAK, JR., CLERK

Supreme Court of the United States

October Term, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York, and
 EWALD B. NYQUIST, as Commissioner of Education of the
 State of New York,

and

Appellants.

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL,
 Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH
 SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR
 GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn,
 New York,

and

Appellants.

EARL W. BRYDGES, as Majority Leader and President Pro Tem
 of the New York State Senate,

against

Appellant.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
 BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS,
 HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM,
 BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-
 OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and
 HOWARD SQUADRON,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
 SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS LEVITT AND NYQUIST

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Citations to Opinion Below

The opinions of the United States District Court for the Southern District of New York are reported at 342 F. Supp. 439 (printed in Appendix to Jurisdictional Statement of Appellants).

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, Sections 2281 and 2284. The judgment holds Chapter 138 of the New York Laws of 1970 to be unconstitutional on the ground that it violates the Establishment Clause of the First Amendment to the Constitution of the United States, and enjoins the defendants Levitt and Nyquist from making payment under that Chapter to nonpublic schools in the State.

The complaint sought declaratory and injunctive relief against the implementation of Chapter 138, alleging that the statute violated the Establishment Clause by providing payments to nonpublic schools in the State as partial reimbursement to those schools of the cost of providing testing and record keeping services to the State, as required by State Law and regulation.

The final judgment granting the relief sought in the complaint was made and entered June 1, 1972. Notice of appeal on behalf of defendants Levitt and Nyquist was filed on June 19, 1972 in the United States District Court for the Southern District of New York. Notices of Appeal were also filed on behalf of the intervenor-defendants Cathedral Academy, St. Ambrose School, and Bishop Loughlin Memorial High School on June 30, 1972, on behalf of intervenor-defendant Earl W. Brydges on July 1, 1972, and on behalf of Bais Yaakov Academy for Girls and Yeshivah Rambam on July 10, 1972.

The appeals were docketed August 18, 1972. Probable jurisdiction was noted on November 6, 1972.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United State Code, Sections 1253 and 2101(b).

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

“Congress shall make no law respecting the establishment of religion * * *.”

The prohibition of that section has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States.

Chapter 138 of the New York Laws of 1970 provides as follows in pertinent part (the full text is set out as an Appendix to this brief) :

“Section 1. It is hereby determined and declared as a matter of legislative finding:

“That the state has a primary responsibility to assure that its precious resources, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

“That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

“That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

"Non public schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

"§ 2. There shall be apportioned annually by the commissioner [of education] to each qualifying school, for school years beginning on or after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulations. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

"a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

"b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

* * *

"§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

"9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law [which prohibits discrimination in pupil enrollments]."

Question Presented for Review

Does the partial reimbursement by the State of nonpublic schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in accordance with the requirement that such nonpublic schools provide an acceptable prescribed minimum standard of education to the pupils so enrolled?

Statement of the Case

Appellees, suing on behalf of themselves and their children, commenced this action seeking to have Chapter 138 of the New York Laws of 1970 declared unconstitutional, alleging that it violates the Establishment Clause of the First Amendment to the Constitution of the United States. Appellees also alleged that the statute violate Article XI, section 3, of the New York State Constitution, which prohibits the expenditure of public moneys, except for examination or inspection, to or in aid of denominational schools or in which religious doctrines are taught. The complaint sought an injunction restraining the implementation of the law, insofar as it provides money for sectarian schools.

A motion was made by the defendants in the action, seeking dismissal of the complaint on several grounds, among which were that the complaint failed to state a claim upon which relief could be granted, and dismissal of the complaint as to one of the original defendants, Nelson A. Rockefeller, on the ground that the complaint sought no

relief against that defendant and that he had no power or responsibility in the administration of the law. The latter part of the motion was granted by the District Court (LASKER, J.). Defendants also sought dismissal of the action on the ground that the complaint raised a threshold question of validity of the statute under the Constitution of the State of New York and that that question should be determined in State Courts prior to the commencement of a Federal Court proceeding. That application was denied (*Committee for Public Education and Religious Liberty v. Rockefeller*, 322 F. Supp. 678).

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the act. The motion was granted.

Subsequent to the granting of an order for the convening of a three-judge District Court, interrogatories were served by intervenor-defendants on the plaintiffs and by the plaintiffs upon defendants and intervenor-defendants. The answers to those interrogatories are a part of the record in this case and the Exhibits to the answers of defendant Nyquist to plaintiffs' interrogatories have been submitted to the Court as a supplement to the Appendix on this appeal.

The facts are not in dispute. On April 18, 1970 Governor Rockefeller signed Chapter 138 of the Laws of 1970, to become effective July 1, 1970. The statute directs the Commissioner of Education of the State of New York to annually apportion to nonpublic schools in the State the sum of \$27.00 multiplied by the average daily attendance of pupils in grades one through six in each such school, and the sum of \$45.00 multiplied by the average daily attendance of pupils in grades seven through twelve in each nonpublic school. That sum would be reduced by

1/180th for each day less than 180 that the school was actually in session during a school year.

The moneys provided for in the statute are to be paid to the nonpublic schools as compensation for expenses incurred in rendering services to the State for examination and inspection, in connection with administration, grading and compiling and reporting of the results of tests, maintenance of records of pupil enrollment and attendance and reporting thereon, recording of personnel qualifications and characteristics, and the preparation and submission to the State of various other reports provided for by law or regulation.

The sum of \$28,000,000 has been appropriated for payments to be made in each fiscal year since the enactment of the statute. Since plaintiffs did not seek a temporary restraining order enjoining payment of the appropriated amounts until the time of argument on the merits in the District Court, payments were made under the act by the State to the nonpublic schools for the entire 1970-1971 school year and for the first half of the 1971-1972 school year.

The expressed purpose of the statute, as set forth in the first section of the act, is to insure, through examination and inspection, that the young people of the State enrolled in nonpublic schools are in daily attendance upon instruction as required by law and are maintaining levels of achievement which will adequately prepare them for "the challenges of American life in the last decades of the twentieth century".

The expressed purpose of the statute is to provide compensation to the nonpublic schools for services mandated by State law or by regulation of the Commissioner of Education. These services are performed for the purpose of

determining that the schools meet the requirements of the compulsory attendance laws of the State and the requirements of minimal educational instruction and standards. This involves both testing and record keeping requirements from which the State may in the course of visitation or inspection of the schools or from reports compiled from the records so kept determine whether or not the requirements of State law are being met.

New York State has set minimum standards of educational quality through the requirements of various sections of the New York Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to those of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected.

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regents' examinations, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and non-public school pupils. In the Court below, counsel for ap-

pellees argued that most of the tests administered in the nonpublic schools were formulated by teachers, were not provided for or required by regulation, and were an integral part of teaching, thus rendering payment for the costs of administering and reporting on the results of such tests payment in support of the teaching mission of the non-public schools. The overwhelming majority of tests given in public or nonpublic schools are formulated, administered and graded by teachers. The importance of these tests in determining the equivalency of education provided by the nonpublic schools is, however, recognized by regulation. Section 176.1(b) of the Regulations of the Commissioner of Education (8 NYCRR 176.1[b]) specifically provides as to nonpublic schools:

"Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner."

In addition, various reports are required from non-public as well as public schools, all of which procedures and devices have the purpose of assuring that the minimum State educational standards are maintained throughout all the schools in the State, both public and non-public alike.

As of April, 1970, there were 2,038 nonpublic schools in the State of New York. A staff study prepared for the State Education Department listed some of the required services performed by those schools, among which were PEP testing, administering Regents examinations for schools offering a Regents diploma, plus equivalent examinations for areas where Regents examinations are not offered, periodic examinations for the evaluation of the

educational progress of students, providing transfer records certifying grades, providing health transfer records, providing information under the Basis Educational Data System, which includes statistical information as to students, teachers, curricula offered, physical plant, etc., statistical data pertaining only to nonpublic secondary schools, somewhat more detailed in nature and type of information than the Basic Educational Data System, maintaining health service records, administering examinations to students not qualifying for a Regents diploma and maintaining those records for inspection, and maintaining attendance records. The same report recommended expansion of the information required to be provided by the nonpublic schools but concluded that "The present funding for the performance of such services is not adequate to cover this area" (Supplement to Appendix, Exhibit F).

Subsequent to the enactment of Chapter 138, another study was prepared for the State Education Department by three research consultants, each operating independently, analyzing the cost of the mandated services for which compensation is made pursuant to Chapter 138. That study concluded that the \$28,000,000 specified in the law as compensation for the mandated services is justified on the basis of the actual cost to the schools in performing those services. This report is attached to defendant Nyquist's answer to plaintiffs' interrogatories as Exhibit D (Supplement to Appendix Exhibit D). In all cases, the amount expended either in the school as a whole or on a per pupil basis was found to be substantially greater than the amount of compensation received from the State for those services. For example, it was found that the average per pupil cost for mandated services is \$82.50 per year, as contrasted with the Chapter 138 formula of \$27.00 per pupil.

at the elementary level and \$45.00 per pupil at the secondary level.

In October 1971, a study of the costs of administration of only three required tests was made and submitted to the Regents of the University of the State of New York (Supplement to Appendix, Exhibit G). That study showed that those three tests alone cost the nonpublic schools an average of \$19.00 per pupil. It also concluded that the per pupil allocation of Chapter 138 was justified on the basis of the actual costs of the services provided.

The District Court, in its decision in this case, found the New York statute to be unconstitutional under Federal constitutional provisions and did not rule on contentions made by the plaintiffs as to constitutionality under provisions of the State Constitution. The Court based its finding of unconstitutionality upon the recent decisions of this Court in *Lemon v. Kurtzman* and *Earley v. DiCenso* (403 U. S. 602). The Court found that the nature of the aid provided under the New York statute is the same as that provided under the Pennsylvania act in *Lemon*, that is, "financial assistance paid directly to the church-related school." The Court found inapplicable any analogy to bus transportation, school lunches or textbooks as "secular, neutral, or non-ideological" services, on the basis that the greatest proportion of the funds are payable as reimbursement for the administration of tests and that testing "is an integral part of the teaching process." An actual or potentially excessive entanglement between government and religion was also found by the Court, as was a potential for "aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation."

The dissenting District Judge (PALMIERI, J.) would have found the statute to be a "legitimate exercise of the duty of

the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law." Judge PALMIERI's opinion pointed to the fact that the statute provides for only a fractional reimbursement of the cost of record keeping and testing required of nonpublic schools by State law and regulation. The dissenting opinion further observed:

"A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U. S. 672, 678 (1971), that

'candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication'

and that '[j]udicial caveats against entanglement' are a 'blurred, indistinct and variable barrier.' "

The dissenting judge would have found that reimbursement for testing and record keeping constituted payment for a neutral, secular and nonideological purpose, and was, thus, constitutional.

Subsequent to the entry of judgment a motion was made on behalf of the Majority Leader of the New York State Senate, Earl W. Brydges, for leave to intervene as a defendant. That motion was granted. Motions for a stay of the injunction pending appeal to this Court were also made, both in the Court below and to a Justice of this Court, and were denied.

Summary of Argument

No one will question that a State may not use tax money for the support of religion. That, however, is not at issue in this case. What is at issue here is a statute which provides for partial reimbursement to nonpublic schools of the costs of informational services provided by those schools to the State as a result of the mandates of statutes or regulations. New York State must permit children to attend nonpublic schools if they so desire; that is their constitutional right. At the same time, however, New York State has a legitimate area of concern in ascertaining that those children do attend school, as required by the compulsory Education Law of the State of New York, and that the schools they attend provide an education which meets State minimum standards. To obtain this information, New York State requires all schools, both public and nonpublic, to maintain records of attendance, health records, and personnel records of faculty, to administer certain specific State tests; and to maintain a continuous program of testing to provide information as to educational levels achieved; and to report to the State on the information contained in these records and ascertained from the tests. Public schools are partially reimbursed for these services in the form of State aid. The statute here at issue provides partial reimbursement to the nonpublic schools in the form of a fixed dollar amount per pupil (\$27.00 per elementary pupil and \$45.00 per secondary pupil). The moneys so provided are not provided to pay for the costs of educating children, but only to pay for the costs of informational services designed to determine whether, in fact, the children are being educated.

What is prohibited by the Establishment Clause is aid directed to the advancement of religion. Programs having the purpose of securing information necessary to determine

if State laws, regarding attendance at schools and minimal educational standards, are being met are not directed to the aid of religion; they do not have as their objective the aid of any or all religions, but only assist the State in securing necessary information, and assist children in assuring that the schools they attend provide adequate educational programs. This program does not, therefore, constitute an establishment of religion.

The compensation of schools for provision of informational services to the State has a secular primary effect and purpose. It does not, therefore, constitute an establishment of religion in violation of the prohibitions of the First Amendment.

Where the purpose and effect of the statute is solely to provide reimbursement for noneducational services provided to the State and not to assist the nonpublic schools in their educational functions, there is neither room for nor possibility of excessive entanglements between the church and State. With or without compensation, the State may require and the schools must provide information as to compliance with the compulsory attendance laws and with the requirements of minimal educational standards. The mere fact that the State sees fit to compensate the schools for a portion of the cost of providing the information required by the State does not render either the program or the reimbursement unconstitutional, either in the historic concept of the First Amendment or as it has been interpreted by this Court.

ARGUMENT

The compensation of nonpublic schools for secular non-teaching services rendered to the State in compliance with State law and regulation does not constitute an establishment of or aid to religion.

A. Factually, the New York Legislature's intent in enacting Chapter 138 was to compensate schools for providing required information to the State, concerning compliance with the State's Education Law by nonpublic schools.

The expressed purpose of Chapter 138 of the New York Laws of 1970 is to partially compensate nonpublic schools, without regard to whether they are sectarian or nonsectarian in nature, for expenses incurred by those schools in keeping records, administering tests, and filing reports as required by State law and regulation.

New York's legislative history clearly shows the incorporation of nonpublic schools within the State's ambit of educational concern. For example, in the State of New York nonpublic schools are chartered by the Board of Regents of the University of the State of New York (New York Education Law, § 216 [McKinney's Consolidated Laws of New York, Book 16]). There is regular inspection by the State Education Department of the nonpublic as well as the public schools (Education Law, § 305 [2]). Nonpublic schools are exempt from taxation (New York Real Property Tax Law, § 420 [McKinney's Consolidated Laws of New York, Book 49 A]). Attendance at a nonpublic school complies with the State's compulsory education law (Education Law, § 3204) and satisfies the requirements for part-time attendance (Education Law, § 4601). Terms of attendance in the nonpublic as well as the public school are prescribed (Education Law, §§ 3204-3205), and certain curriculum requirements are imposed (Education Law, §§ 3204, 801-811, 3002).

The State has not only imposed these requirements on the nonpublic schools but it has also recognized the importance of insuring that these requirements are complied with by both sectarian and nonsectarian nonpublic schools. In furtherance of that interest an exception was incorporated into the New York State Constitution's prohibition against the use of public moneys in aid of denominational schools, authorizing the use of public moneys "for examination or inspection" of those schools (New York Constitution, Article XI, § 3).

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regents' examinations, (state-wide tests of subject matter achievement), the so-called "PEP Tests" (Pupil Evaluation Program) in grades 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils. In the District Court, counsel for appellees argued that most of the tests administered in nonpublic schools were devised by the teachers and were an integral part of the teaching program of nonpublic sectarian schools, thus contending that payment for the costs of administering and reporting on the results of such tests payment in support of the teaching mission of the schools rather than compensation for nonideological services to the State. The overwhelming majority of tests given in public and nonpublic schools alike are formulated, administered and graded by teachers. However, the importance of such teacher-formulated tests in determining the equivalency of education provided by the nonpublic schools has been recognized by regulation. Section 176.1 (b) of the Regulations of the Commissioner of Education (8 NYCRR 176.1 [b]) specifically provides as to nonpublic schools :

"Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner."

In addition, to testing programs, various reports are required from nonpublic as well as public schools, all of which are designed to assure that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike.

As of April, 1970, when Chapter 138 was enacted, there were 2,038 nonpublic schools in the State of New York. A staff study prepared at that time for the State Education Department listed some of the required services performed by those schools, among which were administration of the tests described above, providing transfer records certifying grades, providing health transfer records, providing information under the Basic Educational Data System, which includes statistical information as to students, teachers, curricula offered, physical plant, etc., statistical data pertaining only to nonpublic secondary schools, somewhat more detailed in nature and type of information than the Basic Educational Data System, maintaining health services records, administering examinations to students not qualifying for a Regents diploma and maintaining those records for inspection, and maintaining attendance records. That same report recommended expansion of the information required to be provided by the nonpublic schools, but concluded that "[t]he present funding for the performance of such services is not adequate to cover this area" (Supplement to Appendix, Exhibit F).

These requirements, imposed upon the nonpublic schools by law or regulation, involve considerable additional expense to the schools for which, immediately prior to the enactment of Chapter 138, the nonpublic schools were not compensated, although public schools do receive compensation in the form of state aid, based on a percentage of their operating costs, for similar services which they render to the State.

Consequently, the program provided by Chapter 138 is merely a method of partially compensating all nonpublic schools for expenses entailed in keeping records and marking reports mandated by the State as part of its system of inspecting and examining the educational quality of nonpublic schools attended by children in compliance with the State's compulsory attendance law.

Nor is this a new program. While immediately prior to the enactment of Chapter 138 in 1970, nonpublic schools were not compensated for the expenses of examination and inspection required by the State, until 1968 some 250 nonpublic schools were so compensated and had since 1892. Beginning with Chapter 26 of the New York Laws of 1892, appropriations were made annually to "academies" for unspecified services in connection with compulsory attendance requirements. Those academies included sectarian and nonsectarian nonpublic schools. That provision was incorporated in the New York Education Law in the consolidation of 1907 as section 453 and was continued and renumbered as section 493 in the consolidation of 1910. The provision thereafter remained unchanged until its repeal in 1930. However, even after the repeal of section 493, the State's Local Assistance Appropriation Bills (the appropriation for state aid) contained, until 1968, an appropriation of \$35,000 in connection with the "attendance requirements of academic pupils at academies meeting the requirements of

regents rule". These moneys were apportioned and paid as they had been prior to 1930 to sectarian and nonsectarian schools alike.

While the program and appropriations had been continued, the total amount of money so provided had remained unchanged since 1931. Thus, the per-pupil allocation had diminished in proportion to the increasing enrollment in nonpublic schools. Consequently, by 1968, the per-pupil allocation, spread over 130,000 academic pupils, in non-public schools which were eligible for that assistance, amounted to less than 27 cents per pupil. Pupil enrollment increases and economic inflation had reduced the amount paid to only a small fraction of the cost of keeping the records necessary to qualify for receipt of the money. Additionally, the increased proportion of public school support which was being received from the State, as contrasted with state aid in 1931, increased the disparity between public and nonpublic schools in compensation received for this one class of record keeping services alone. Furthermore, the program originally involved only certain specified academies and no contribution was made toward the expenses incurred by other nonpublic schools in which were enrolled the majority of the 850,000 pupils in nonpublic schools throughout the State, and which performed the same services for the State.

The program adopted by the New York Legislature in 1970, therefore, merely reinstated a past practice of compensating nonpublic schools for record keeping and examination services required of them by the State, updated the amount paid to reflect current conditions, and made the base of payment more equitable by including all nonpublic schools and all examination and record keeping requirements of the State. The cost analysis studies made by the

Education Department (Supplement to Appendix, Exhibits D and G) demonstrate that the payments made to the non-public schools are justified in amount and, in fact, are still substantially less than the actual cost of performing the services.

Chapter 138 of the New York Laws of 1970 clearly sets forth the purposes for which the payments thereunder are to be made. In the legislative findings, section 1 of the statute, is stated:

“* * * the state has a primary responsibility to assure that its precious resource the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

“* * * the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.”

After setting forth the general purpose of the statute, the act then sets forth the specific items for which payments are to be made. These are the “expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.”

Thus, it is clear that the payments provided for in the statute are for the purpose of examination and inspection

of nonpublic schools to assure that the children attending them are complying with the State's compulsory attendance law and that the schools meet minimal standards of educational quality. The payments are not made for the purpose of aiding the educational or teaching mission of the schools.

B. The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examination, record keeping, and reporting requirements does not constitute an establishment of religion in the historical context of the First Amendment.

While, of course, the extent of the First Amendment's application to present-day statutes is not limited to the concepts of the drafters of the Amendment, the meaning which they ascribed to it has been considered in depth by this Court in applying the Amendment to current situations (see, e.g., *Everson v. Board of Education*, 330 U. S. 1 [1947]; *Abington School District v. Schempp*, 374 U. S. 203 [1963]; concurring opinions of Justices DOUGLAS and BRENNAN in *Lemon v. Kurtzman*, 403 U. S. 602 [1971]).

When the early settlers came to this country from Europe, they brought with them, not only political and social customs, but also many of the religious problems which were indigenous to their countries of origin. In Europe there were religions established and supported by government, a factor which engendered many of the emigrations which founded the United States. Persecution in the name of religion drove many colonists from Europe to America. But those same practices were, in many instances, transplanted to the New World and, at the time of the adoption of the Constitution and the Bill of Rights, there were established churches in a majority of the original Thirteen Colonies and almost every state exacted some kind

of tax for church support. In the language of the opinion of this Court in the *Everson* case, *supra* (p. 11):

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment."

Consequently, the original and prime intent of the First Amendment was to prohibit the direct establishment of a national church and to further prohibit the direct support of any one religion or of all religions.

But what of statutes and government actions other than direct establishment? While not a member of the Congress which adopted the Bill of Rights, Thomas Jefferson is considered as a spokesman for the anti-establishment movement. It was he who first used the phrase "a wall of separation between church and state" in his letter to the Danbury Baptists in reply to their address of congratulation and good wishes upon his becoming President of the United States. That Jefferson did not consider this "wall" to bar all relations between government and religion is clear from both his actions and subsequent writings. Thomas Jefferson was President of the United States for eight years, during which time Federal funds were used to aid religion in various ways without protest from the President. Federal funds were used to support missionaries to Christianize and civilize the Indians. The chaplain services for the Army and Navy had been established long before Jefferson became President and was continued under his tenure as Commander-in-Chief. Probably Jefferson's most specific statement in regard to the relation of government to religion is found in a statement made in 1822, after he had left

the presidency, concerning freedom of religion at the University of Virginia, of which he was one of the founders. In his report as Rector, Mr. Jefferson stated:¹

"The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit of the public provision made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools, on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University. . . . Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected . . . or in the lecturing room of such professor."

Jefferson, therefore, saw no breach in the "wall of separation" resulting from nonpreferential aid to sectarian students, or from accommodation of secular and sectarian institutions to each other.

Next to Jefferson, Madison ranks as probably the most significant spokesman on the meaning of the First Amendment. Possibly he should even be given foremost status since he was primarily responsible for the language of the Amendment. On June 8, 1789, Madison in the First Congress stated that his understanding of the meaning of the

¹ 19 The Writings of Thomas Jefferson (Memorial Edition, 1904), 414 *et seq.*, quoted in *McCollum v. Board of Education*, 333 U. S. 203, 245-246 (1948).

Amendment was that: "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."² In his *Detached Memoranda*, written some time after 1817, Madison wrote that the people of the United States, "have the noble merit of first unshackling the conscience from persecuting laws and of establishing among religious sects a legal equality."

Madison also was President of the United States for eight years, during which time also Federal funds supported military chaplaincies and missionaries to the Indians without criticism from the President.

We can find no support in the writings and opinions of the formulators and spokesmen for the First Amendment for the argument that all public payments to all nonpublic schools, regardless of their religious affiliation, constitutes an establishment of religion. Nor can any support be found for that proposition in the total record of the Presidents or the Congress.

As previously stated, Federal funds for missionaries to the Indians were first paid under Washington and continued until 1900 when changed conditions on the reservations, not constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt

² 1 Annals of Congress 729-731 (Benton ed. 1858).

from the draft, as are conscientious objectors; the Bible is used for administering oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; Federal funds were made available to sectarian institutions to repair buildings and replace equipment lost or damaged in the floods of June, 1972; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act.⁸

Many other Federal statutes have provided nondiscriminatory aid to students attending both public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act,⁹ free milk under the Agriculture Act of 1949,¹⁰ the National Defense Education Act of 1958,¹¹ College Housing Act of 1950,¹² the Higher Education Facilities Act,¹³ the Higher Education Act,¹⁴ the Elementary and Secondary Education Act,¹⁵ the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations,¹⁶ and the G. I. Bill of Rights.¹⁷

⁸ Hill-Burton Act of 1946, 60 Stat. 1040, 42 U. S. C. §§ 29-92.

⁹ 60 Stat. 230 (1946), 42 U. S. C. § 1751.

¹⁰ 63 Stat. 1051 (1949), 7 U. S. C. § 1431.

¹¹ 72 Stat. 1580 (1958), 20 U. S. C. §§ 401-589.

¹² 12 U. S. C. §§ 1749-1749e.

¹³ 77 Stat. 363 (1963), 20 U. S. C. §§ 701-757; *Tilton v. Richardson*, 403 U. S. 672 (1971).

¹⁴ 79 Stat. 1219 (1965), 20 U. S. C. §§ 1001-1144.

¹⁵ 79 Stat. 27 (1965), 20 U. S. C. §§ 236-244, 331-332.

¹⁶ 58 Stat. 765 (1944), 40 U. S. C. §§ 484 (j) and 484 (k); 107 Cong. Rec. 17351.

¹⁷ 66 Stat. 663 (1952), 38 U. S. C. § 911.

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment does not bar non-preferential payments of public money to all schools, all pupils, or all institutions, regardless of religious affiliation, and that where valid secular purposes are the primary basis for the payment of public money, such payments are constitutional and valid.

C. The payment to nonpublic schools, both sectarian and nonsectarian alike, of reimbursement for expenses incurred in fulfilling State examination, record keeping, and reporting requirements does not constitute an establishment of religion as defined by the decisions of this Court, but is rather a constitutional use of State funds for State purposes.

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case (*Everson v. Board of Education*, 330 U. S. 1 [1947]). In that case, this Court held that the nonpreferential provision of school bus transportation for children attending both public and nonpublic schools did not constitute aid to or an establishment of religion. In so holding, the Court, in an opinion by Mr. Justice BLACK, clearly set forth the purpose and intent of the Establishment Clause, stating (pp. 15-16) :

“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can

be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*"

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That opinion did not declare to be prohibited general public programs not intended or directed to the aid of religion which incidentally or collaterally aid a religious institution.¹³

Even more recently than *Everson*, a decision of this Court has clearly held that laws are not rendered invalid solely because there may be some indirect or collateral aid to proponents of a religious belief or to sectarian institutions. In the Sunday-closing cases, this Court upheld the validity of laws making Sunday a universal day of rest in the face of the admittedly religious origin of those laws and the fact that their current enforcement incidentally aids certain religious denominations in the profession of their beliefs. In so holding, this Court interpreted the Establishment Clause "in the light of its history and the evils it was designed forever to suppress" (*McGowan v. Maryland*, 366 U. S. 420, 442 [1961]). The opinion further states (p. 442):

"* * * the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenents of some or all religions."

¹³ The only aid to religion or religious institutions which might be found in the payments pursuant to Chapter 138 would arise out of the freeing of the institution's funds, which would otherwise be used in the performing of State mandated functions, for the sectarian use of the institution.

Furthermore, as this Court said in *Everson*, (*supra*, 330 U. S., p. 18) :

"That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

In the instant case, where the State has imposed these record keeping, examination and reporting requirements upon the nonpublic schools for State purposes, to deny the State the right to compensate the schools, at least in part, for the cost of fulfilling those requirements would be, in effect, requiring the State to be the adversary of religious institutions.

Mr. Justice FRANKFURTER, concurring in *McGowan*, *supra*, stated the purpose of the Establishment Clause to be simply to assure that religion, as religion, would not be made the object of legislation (366 U. S., p. 465). In this regard, he stated, the object of the legislation must be determined (pp. 466-467) :

"To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCullum*. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for the promotion of religion—the statute

cannot stand. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d'être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce v. Society of Sisters*, 268 U. S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment,' even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone."

In the same opinion, rejecting a plea to look behind the legislative findings of the statutes there involved, Mr. Justice FRANKFURTER also observed (p. 469):

"• • • the private and unformulated influences which may work upon legislation are not open to judicial probing. 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' *McCray v. United States*, 195 U. S. 27, 56. 'Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts.'"

Applying these decisions to the instant case, we observe the following factors. The intent of the statute was set forth in the statement of legislative policy in Chapter 138, as has been quoted previously in this brief. That state-

ment may be summarized to show intent to assure that students who elect to attend nonpublic schools are actually in daily attendance at those schools; that they receive an education which at least minimum requirements, both in course content and teacher qualifications; and that the education they receive is adequate for them to reach levels of achievement at least on a level with students in public schools. The statute demonstrates a secular policy of assuring equality of educational opportunity to all children.

Of greatest significance in determining the validity of the statute here involved are the decisions of this Court in *Lemon v. Kurtzman* (403 U. S. 602 [1971]) and *Tilton v. Richardson* (403 U. S. 672 [1971]) as the latest examination by this Court of that issue. An analysis of those opinions, we submit, clearly shows that the program enacted by Chapter 138 is not prohibited under the decisions of this Court and is, in fact, a valid, constitutional program of the State.

In the *Lemon* case, the Court was confronted with two statutes, one of which provided a subsidy for the payment of the salaries of teachers in nonpublic schools and the other provided compensation to the schools for the teaching of certain secular subjects by the nonpublic schools. In *Tilton*, the Federal Higher Education Facilities Act, providing for the construction of college academic buildings, was involved.

Examining the statutes in those cases, this Court observed in *Lemon* (403 U. S., p. 612):

“Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation [between constitutionality and unconstitutionality] in this extraordinarily sensitive area of constitutional law.”

and again (p. 614) :

"Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

In *Tilton*, the Court repeated the statement in *Lemon*, first above quoted, as applicable to that case as well (403 U. S., p. 678).

The tests of constitutionality were stated in *Lemon* as being (pp. 612-613) :

"In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970).

* * *

"* * * Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz, supra*, at 674."

In *Tilton*, this Court said (p. 679) :

"The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In applying those tests, this Court stated in *Lemon* (p. 615) :

"In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions

benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

In the instant case, while the character and purposes of the institutions receiving the money may be the same as those in *Lemon*, the nature of the payments so provided and the resultant relationship between government and religion are vastly different.

This Court in the cases above cited recognized that the State has certain legitimate concerns which establish a legitimate area of contact with sectarian schools, and that certain types of aid or payments are by their nature constitutional, even though they may provide some indirect benefit to the sectarian mission of the schools. In that regard, this Court said in *Lemon* (403 U. S., p. 613):

"A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."

and again at page 614:

"Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts."

In that regard, it should be noted, Chapter 138 is directed, in part at least, to assuring compliance with the compulsory attendance laws of the State of New York.

Further, in *Lemon*, this Court also observed (pp. 616-617):

"Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

In *Tilton*, this Court rejected any theory that all financial aid to sectarian institutions was constitutionally prohibited, stating (p. 679) :

"The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U. S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld."

In the instant case, the aid involved is secular, neutral and non-ideological. It compensates all nonpublic schools, sectarian and non-sectarian alike, for record keeping, testing and reporting, required by the State in enforcing the compulsory school attendance laws and for the purpose of assuring that the schools are fulfilling requirements of State law and regulation providing for minimal educational standards. The tests for which compensation is made are either State devised tests, administered in both public and nonpublic schools pursuant to State requirements, or are tests designed by teachers but administered as required by regulation of the Commissioner of Education in order to measure compliance with the minimal educational standard requirements. These testing, record keeping and reporting functions are both secular and non-ideological in nature.

Although compensation of the schools for these non-ideological services will free other money of the schools so that it could be used to advance the sectarian mission of the schools, or for the improvement of secular educational services, that factor alone is not a basis for invalidation of the statute, as this Court observed in *Tilton*, as quoted above.

While invalidating the statutes at issue in the *Lemon* case, this Court also found that a "comprehensive, discriminating, and continued state surveillance will be inevitably required" to insure that restrictions against the use of the money, there provided, for sectarian purposes would be obeyed. This Court was concerned about the extent of the inspection and auditing which would be required to determine the amount of a school's expenditures for secular and sectarian education for the purpose of determining the amount of compensation to be paid. This, the Court found, would result in "excessive entanglement" between government and religion. Here, however, there is no need for continuing surveillance. In the instant case, the statute provides for a flat grant, worth much less than the actual cost to the schools of the services rendered to the State, which is distributed to the schools as reimbursement for services already rendered and does not require continued auditing or surveillance to determine how the money is spent.

In *Tilton*, upholding the Federal Act there involved, this Court observed that "The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides." The Pennsylvania and Rhode Island statutes involved in *Lemon* were distinguished on the basis that "There are no continuing financial relationships or dependencies, no annual audits, and

no government analysis of an institution's expenditures on secular as distinguished from religious activities."

The statute in the instant case is immeasurably different from those invalidated in *Lemon*. The aid is secular, nonideological and neutral in nature. It does not involve annual audits or governmental surveillance over expenditures. It merely compensates the schools for a part of the costs they incur in providing record keeping and testing services required by the State in enforcing compulsory school attendance laws and laws requiring attainment of minimal educational standards by the nonpublic schools.

The education of our Nation's children has, quite properly, been recognized by this Court as a proper subject of state legislation enacted in furtherance of a public interest (*Cochran v. Louisiana State Board of Education*, 281 U. S. 370 [1930]; *Board of Education v. Allen*, 392 U. S. 236 [1968]). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning. Rather, educational goals may effectively be satisfied through private education (*Pierce v. Society of Sisters*, 268 U. S. 510 [1925]). As a corollary to the *Pierce* decision and considering the State's interest in satisfying its compulsory attendance laws through private educational institutions, this Court, in the *Allen* case, observed (392 U. S., p. 247):

"• • • if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function."

The statute here in question does not involve the State in the actual educational process of the schools. It does not compensate them for their teaching function as such. It does no more than compensate all private schools, sectarian

and nonsectarian alike, for the expenses of record keeping and administration of examinations necessary to assure that those schools are maintaining that quality of secular education necessary for the young people of the State, that is, in determining the "manner in which those schools perform their secular function."

In *Allen*, this Court further observed as to the nature of nonpublic schools (p. 245) :

"The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However this Court has long recognized that religious schools pursue two goals, religious instruction and secular education."

The State requirements, for which compensation is provided by Chapter 138, are directed solely to the secular educational function of the nonpublic schools and are compensation for measuring rather than teaching devices.

As to the powers of the States in regulation of nonpublic schools this Court stated in *Allen* (pp. 245-246) :

"Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."

If the State may establish such regulations, and consequently require compliance with record keeping, reporting and testing requirements, in order to assure compliance with these regulations, then surely the State should be allowed to alleviate in part the cost burden it has imposed on the schools by these informational requirements.

It is necessarily a secular purpose and intent to assure that children attending nonpublic schools comply with the compulsory attendance laws of the State, that they are receiving an adequate education from qualified teachers, and that they are tested in accordance with State standards of academic achievement. Since these are secular, neutral and non-ideological requirements and services, fulfilling State-imposed requirements, and since the moneys apportioned to the nonpublic schools are solely for the purpose of compensating them for those required secular services, then neither the purpose nor the primary effect of the enactment is the advancement or inhibition of religion.

One final quotation from the *Allen* case is pertinent here, summarizing the relationship of the sectarian function to the secular education function of the private schools as viewed by this Court. The Court there stated (392 U. S., 247-248):

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial system, strongly suggest that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

If the State may expend public moneys to insure that public schools provide minimal levels of education, if the nonpublic schools are a constitutionally acceptable conduit for the teaching of children in secular subjects, if the State may require that nonpublic schools meet specific standards of minimal educational offerings and achievement, and if the State may require that nonpublic schools keep records, administer tests and report thereon in order to assure that they comply with State imposed educational requirements, then the State must also be able to spend public moneys to assure that these schools actually do perform in an acceptable manner and that students attend in compliance with the compulsory education laws. That permissible expenditure of public moneys must include the right to compensate the schools for the expenses imposed upon them by the examination and inspection requirements of the State.

Chapter 138 of the New York Laws of 1970 has a secular legislative intent and a primary effect which neither advances nor inhibits religion. The payments provided under Chapter 138 are for neutral, secular and non-ideological services to the State by the nonpublic schools. The provision for those payments does not involve an excessive entanglement between government and religion. The statute, therefore, does not violate the Establishment Clause of the First Amendment to the Constitution of the United States and is, consequently, constitutional.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed and that judgment should be entered holding Chapter 138 of the New York Laws of 1970 to be constitutional and valid.

Dated: December 18, 1972.

Respectfully submitted,

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APPENDIX

Chapter 138

An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor.

Approved April 18, 1970, effective July 1, 1970.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding :

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Non public schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools

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which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not

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in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.
2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

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3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a non-profit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid on or before March fifteenth of such year, and the second to consist of the balance and to be paid on or before May fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

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§ 7. The sum of twenty-eight million dollars (\$28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect July first, nineteen hundred seventy.